



POLICE DEPARTMENT
NEW YORK, N.Y. 10038

DEPUTY COMMISSIONER—TRIALS

May 2, 2011

MEMORANDUM FOR: Police Commissioner

Re: Police Officer Ahmad Brannon
Tax Registry No. 936238
69 Precinct
Disciplinary Case No. 85942/09

Police Officer James Astuto
Tax Registry No. 926611
67 Precinct
Disciplinary Case No. 85943/09

The above-named member of the Department appeared before me on November 17, 2010, charged with the following:

Disciplinary Case No. 85942/09

1. Said Police Officer Ahmad Brannon, while assigned to the 62nd Precinct, while on duty, on or about December 3, 2008, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer purposely depressed the transmit key of his Department radio numerous times in succession during an ongoing radio transmission between a radio dispatcher and a sergeant attempting to obtain a description of a suspect wanted in connection to a crime, thereby interrupting the radio transmission communication.

P.G. 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT

Disciplinary Case No. 85943/09

1. Said Police Officer James Astuto, while assigned to the 62nd Precinct, while on duty, on or about December 3, 2008, did wrongfully engage in conduct prejudicial to the good order, efficiency or discipline of the Department, to wit: said Police Officer purposely depressed the transmit key of his Department radio numerous times in succession during an ongoing radio transmission between a radio dispatcher and a sergeant attempting to obtain a description of a suspect wanted in connection to a crime,

thereby interrupting the radio transmission communication

P G 203-10, Page 1, Paragraph 5 – PUBLIC CONTACT – PROHIBITED
CONDUCT

The Department was represented by Michelle Y Alleyne, Esq , Department
Advocate's Office, and the Respondents were represented by Craig Hayes, Esq

The Respondents, through their counsel, entered pleas of Not Guilty to the subject
charges A stenographic transcript of the trial record has been prepared and is available
for the Police Commissioner's review

DECISION

Respondents are found Guilty

SUMMARY OF EVIDENCE PRESENTED

The Department's Case

[The Department offered in evidence the compact disc of the radio transmissions
for the 62 Precinct on the incident date of December 3, 2008 (Department Exhibit [DX]
5) At 18 minutes, 25 seconds into the recording, the 10-32 (purse snatching larceny)
first comes over the radio Several units are making inquiries about the suspect, his
description and direction of flight At 33 minutes 3 seconds, a further description of the
suspect is requested, and at one point, repeated interruptions are heard The anti-crime
sergeant transmits a message, and repeated interruptions are also heard The anti-crime
sergeant then asks for a time check and the repeated interruptions are heard again It is
estimated that between 4 and 5 interruptions are heard during the request for further

description and the anti-crime sergeant's transmission]

The Department called Lieutenant Geoffrey Varela, Police Officer Salvatore Latorre and Captain Andrew Murray as witnesses

Lieutenant Geoffrey Varela

Varela has been a member of the Department for ten years. He was a sergeant for five years and a lieutenant for about four months. Varela is currently assigned to Transit District 30 where he is the Integrity Control Officer (ICO). His position entails ensuring the integrity of the command and supervising the police officers and sergeants. Prior to working in his current command, Varela was a sergeant in the 62 Precinct. There, Varela was initially a patrol supervisor, looking after a squad and platoon, and responding to radio runs. His primary patrol was the third platoon, which worked from 4 00 p.m. to 12 00 a.m. In his second year with the 62 Precinct, he became the Conditions Sergeant, which entailed addressing precinct conditions. After one year, Varela became the Anti-Crime Sergeant for three years where he responded to serious crimes and felonies in plainclothes. As an Anti-Crime Sergeant, he worked in the fourth platoon from 1730 to 0205.

Varela described his command as "middle-of-the-road," busy with radio runs but not busy with violent crime. He came to know Respondent Brannon when they worked in the same squad in the 62 Precinct. Varela was Respondent Brannon's direct supervisor and would sometimes take him as his driver. Varela explained that he took him as his driver at times because he felt Respondent Brannon was an underperformer and he (Varela) might be able to get him (Respondent Brannon) some activity while supervising

him directly

Varela said he had a good relationship with Respondent Brannon until a friend who was in a car accident informed him that Respondent Brannon and his partner responded and were hostile toward him. The friend told Varela that Respondent Brannon had said words to the effect, ' You should get better friends' and "Varela would never be a Lieutenant '. Upon hearing of this comment, Varela called Respondent Brannon for clarification. When Respondent Brannon answered his cell phone, he told Varela he was not at work, that he did not want to talk to Varela and that he did not have to. Varela then said it was no problem, and that they would discuss it tomorrow.

The next day, Varela called Respondent Brannon back to the command so he could reinstruct him, but Respondent Brannon refused to do so without a Patrolmen s Benevolent Association (PBA) delegate. With the delegate present, Varela tried to reinstruct Respondent Brannon on how to treat members of the public, including family and friends of officers, and to clarify what happened. Varela said Respondent Brannon denied having ever made the statements. After the conversation, Varela considered the issue resolved, however, Varela never asked Respondent Brannon to be his driver again. This incident occurred about two years into his time in the 62 Precinct.

While at the 62 Precinct, Varela came to know Respondent Astuto, who did the day patrol. Though Varela never worked directly with Respondent Astuto, he did manage to observe him on the job. Varela testified that he thought Respondent Astuto was a below-standard officer because he felt Respondent Astuto did not respond to radio runs appropriately, did not speak to the public appropriately, did not want to take police action at times and was disrespectful toward his supervisors. Varela said he specifically

witnessed Respondent Astuto stick up his middle finger behind the back of the precinct commanding officer (CO)

At first, Varela did nothing in response, but he spoke to his platoon commander about the incident when annual evaluations were due. Varela testified that he rated the best member of his squad a 4.0 out of a possible 5.0 and saw that another supervisor rated Respondent Astuto higher than that. He asked his platoon commander if he (Varela) could change his evaluations to rate everyone higher than what he saw Respondent Astuto had been rated. The platoon commander said he knew Respondent Astuto was given too high an evaluation and that he had the final say on the rating. Then, Varela told him about the middle finger incident. Varela said the platoon commander then spoke to the CO, and Respondent Astuto was brought into the CO's office to be confronted. No punitive measures were taken with regard to Respondent Astuto, but Varela was the only one around when Respondent Astuto gave the CO the middle finger, so he assumed Respondent Astuto knew who told the CO. After the CO confronted Respondent Astuto, there was an incident where Respondent Astuto and two other officers were in the break room. The door slammed violently when Varela came near. When Varela asked Respondent Astuto about it, Respondent Astuto responded that it was the wind that caused the door to slam. Varela instructed him to keep the door open.

Varela was working the 5:26 p.m. to 2:10 a.m. tour as the Anti-Crime Sergeant on December 3, 2008. At approximately 9:20 p.m. he heard a radio transmission regarding a larceny in progress involving a purse being snatched. At that point, Varela responded over the radio to get more information on the perpetrator and his direction of flight. Varela heard Police Officer Salvatore Latorre, one of his anti-crime officers, attempting

to provide a further description of the suspect. However, Latorre was being "keyed out." He defined "keyed out" as someone deliberately depressing the radio key so that another officer's transmission would not come through. Varela came to the conclusion that Latorre was being keyed out because "[t]here's no way in the succession of depressed keys that that could come from other than a deliberate act." The succession was rapid, he said. Varela did not know at the time who was keying the radio. He heard no member of service on the radio other than Latorre, but just the rapid clicks lasting a few seconds. When Varela tried to get on the air to do a time check, he felt that someone was deliberately keying him out on the radio, also.

Varela went back to the station house and called the Management Information Systems Division to find out what radios made unauthorized transmissions. He obtained a list of radios that were in service on or about the time of his time checks. That list had radio serial numbers, but not names of members who were assigned the radios. With that information, Varela approached his platoon commander, who spoke to the assistant ICO to get a master list of which radios were assigned to which officers. When the serial numbers were matched up, Varela learned that it was Respondent Brannon and Respondent Astuto who keyed himself and Latorre off the radio. To the best of his knowledge, Varela recalled that neither Respondent Brannon nor Respondent Astuto was assigned to a larceny in the area at the time of the incident. Neither officer was part of Varela's Anti-Crime Team either.

Although Varela received no "specific" training in how to use a Department radio, he is familiar with how to use one. He explained that, if one's key is not depressed, one can hear any radio transmissions in the area. Varela further explained that

one must depress the key to speak, and let go of the key to hear. When not in uniform, as he was on the day in question, Varela mounts his radio to his belt in a swiveling case. The case does not allow the transmit button to remain "open" (depressed). In his ten years of experience, Varela said it is impossible for the rapid succession of clicks to be accidental. Varela said that when the key is depressed for long periods of time, "Central" (the Communications Section dispatcher) emits a loud beep and then announces that there is an 'open carrier,' which means that someone has been holding down the transmit key. Before Central interrupts the held-down key, Varela can usually hear someone's conversation on the other end. On December 3, 2008, Varela did not hear any conversation nor did he hear Central interrupt when either Latorre or he himself was being keyed out.

Upon questioning by the Court, Varela detailed that, although the actual radio used on the day in question may have been slightly bigger than the one produced in court, the transmit key was in the same place. The transmit key might have been a little bigger on the bigger radio, also.

On cross-examination, Varela said the beep and admonition from Central can occur after an officer unintentionally depresses the radio key. He said only a light touch is necessary to depress the key, and that one could do so with any finger. Varela admitted that the key could be pressed several times, but it would be very unlikely for someone to do so in such a rapid succession, as in this case, by accident. He said that, with his experience and training, he believes it is impossible to hit the key rapidly without intention.

Varela agreed that he had given Respondent Brannon some instructions on how to

behave when dealing with the public and friends or family members. He said the meeting involved not only himself and Respondent Brannon but also the platoon commander and a delegate. He thought he remembered the platoon commander telling Respondent Brannon not to do whatever he allegedly did in the future. Varela stated there is no difference in how friends and family should be treated as compared with the general public – both should be treated in a courteous and respectful manner. He said friends and family should especially be treated with respect. Varela then confessed that Respondent Brannon's conduct in telling his friend that Varela should not be a lieutenant did not amount to misconduct. Although Varela said Respondent Brannon did not receive either a Command Discipline (CD) or Charges and Specifications for his action with Varela's friend, it was his opinion that Respondent Brannon was being discourteous. Varela conducted no investigation when his friend told him Respondent Brannon had been discourteous to him.

Varela did not know if failure to respond to a job constituted misconduct. He said that if an officer is called to respond, he must respond. Failure to respond could result in that officer being issued a CD for a minor violation or being reinstructed. Varela said being discourteous is not misconduct, but would lead to an officer being reinstructed on how to deal with the public. He acknowledged that, if the Civilian Complaint Review Board (CCRB) investigated discourtesy to the public and an officer is found – by a preponderance of the evidence – that he was discourteous, he could get Charges and Specifications. Varela said he was basing his testimony that Respondent Astuto was discourteous on personal observations. Varela witnessed him in the past not handle jobs appropriately, not to the point of misconduct, but to where he was not doing what needed

to be done. Varela gave an example of Respondent Astuto's discourtesy when responding to a motorcycle accident. Respondent Astuto apparently told the biker he would not believe his version of the events. Varela thought Respondent Astuto, using his discretion, did not produce an accident report. Even though Respondent Astuto was not brought up on charges or given a CD for it, Varela thought he was discourteous.

Varela noted that there is a big difference between misconduct and his own opinion on what is appropriate. He acknowledged that he witnessed Respondent Astuto give his CO the middle finger. Varela said there were others present in the station house when he saw Respondent Astuto give the middle finger, but he did not believe anyone else saw him give the middle finger to the CO. He stated the CO was a captain, and he did not know whether such an act could result in a suspension. Varela insisted that what he saw was discourtesy and was not sure if it rose to the level of misconduct. He also did not know if he needed to report an act of discourtesy to a supervisor. Varela acknowledged that witnessed acts of misconduct must be reported.

Varela did not know if there was an investigation into Respondent Astuto giving his CO the middle finger. He did know, however, that Respondent Astuto never received a CD or Charges and Specifications for his action. There was no change in his duty status. Varela said he did not know what the ICO was doing when Respondent Astuto was being discourteous. He thought the ICO knew of Respondent Astuto's actions. Varela clarified that his sole basis for believing the charge was the amount of times the radio was keyed in a short period of time.

On redirect examination, Varela clarified that he never said he saw Respondent Astuto fail to take police action. When he said Respondent Astuto acted inappropriately

on jobs, he based his assertion on how he felt Respondent Astuto did not extend himself to his fullest. Varela also recounted an incident where he, the Anti-Crime Sergeant, was covering patrol and made an arrest. He learned that Respondent Astuto had called the command and had opined that he did not feel that an arrest was warranted. The incident involved a baby who was taken to the hospital, where Respondent Astuto was. Varela went to the hospital, explained why the arrest was imperative, and then Respondent Astuto took the arrest.

At no time did Varela think Respondent Astuto's conduct rose to a level where he felt the ICO needed to be contacted for discipline. Varela never intended, while at the 62 Precinct, to get Respondent Astuto in trouble. Varela said he was not Respondent Astuto's direct supervisor, either, their tours would merely overlap by two hours. Varela stated that he was never an ICO while at the 62 Precinct.

Police Officer Salvatore Latorre

Latorre has been a member of the Department for five-and-a-half years. He is currently assigned to the Sergeants Leadership Training, to prepare him for imminent promotion to the rank of sergeant. Prior to that assignment, he was assigned to the 62 Precinct since graduating from the Police Academy. While at the 62 Precinct, Latorre worked with Varela for approximately two years on the Anti-Crime Team responding primarily to priority jobs. Latorre worked the 5:30 p.m. to 2:05 a.m. tour.

Latorre testified that he was working the night of December 3, 2008, in plainclothes in an unmarked car. He heard of a larceny in progress over the radio from Central at approximately 9:20 p.m. Latorre heard several units responding to the scene,

so he began to respond to the location and started to canvass the area. He then attempted to communicate with Central over his radio to get more details on the job. Latorre said he was looking for a better description of the perpetrator, the direction of flight, or anything else that could have helped him. But as he began to talk, Latorre said, "[A]nother radio was repeatedly keyed and drown[ed] out my transmission." He described the keying as 'quick, rapid, within maybe to three seconds.' No one identified himself to him while he was being keyed out. Latorre explained that no one can be heard when someone is repeatedly keying the radio because the transmissions are being "chopped up."

Upon questioning by the Court, Latorre clarified, that what he witnessed sounded more like someone pressing the key and then letting it go repeatedly within a short period of time, rather than the usual mode for using the radio. He said one has to hold the key down the entire time to speak, and then let it go to listen. Otherwise, if the key is held and released, the person will "key out" his own transmission.

During further direct examination, Latorre demonstrated how to use a Department radio. He explained that the radio presented to him was smaller than the standard issue. He said that a repetitious pressing of the transmit button would disallow anyone from hearing or speaking.

Latorre said that when he worked in uniform, his radio would be in a holder with a swivel piece in the back, and that would be on his duty belt. The swivel piece allowed the radio to move in a circular motion, and could be removed when it was upside down. He said it could swivel if an officer were leaned against a chair.

After he was keyed out, Latorre remembered hearing Varela attempt to request a

time check over the radio, but he was keyed out, as well. Latorre said 99% of the time, if a supervisor requests a time check it is because that supervisor isolated an unauthorized transmission and can look back to see the last person to transmit right before that time check. He said there is no way to know the identity of the person keying the radio while it is occurring. No one apologized after the incident, nor did Central indicate an open microphone. Latorre has heard Central so indicate when someone depresses their key for too long and everyone hears background noise. When he returned to the command, Latorre learned that Respondent Astuto and Respondent Brannon had been the officers keying out people and it was being discussed. Latorre had never worked directly with either officer, but had worked with them in the same command for a few years.

During cross-examination, Latorre agreed that things in his duty belt can shift when standing and sitting. He also agreed that the belt can shift more over time if the leather becomes softer. In his experience, an open microphone can occur if an officer is leaning on the key without realizing it. Latorre said it takes very little pressure to press the button, and it could occur by mistake. He also agreed someone could hit it more than once, and that anything, not only one's hand, could push the button. He did state, however, that it would be difficult for anything other than a hand to press the button in such a rapid fashion as he heard on December 3, 2008.

On redirect examination, Latorre clarified that, for someone to make the rapid keying by leaning on the radio, they would have to move back and forth very quickly. He showed the speed with his finger (indicating a rapid succession).

Captain Andrew Murray

Murray has been with the Department for approximately 13 years. He has been a captain for three months with Police Service Area 2, and prior to that he was a lieutenant for four-and-a-half years. While a lieutenant, Murray worked as an ICO for three years of the four he was assigned to the 62 Precinct. He knew every officer in that command. Murray characterized Varela as firm, knowledgeable, good at his job and predominantly well-liked. He characterized Latorre as competent, and said he worked closely with Varela. Murray did not know of anyone at the command who had problems with Latorre. He said Respondent Astuto was competent, but would sometimes be 'abrasive toward members of the public." Murray spoke with Respondent Astuto about it, but did not feel it was a major detriment to his performance. Murray said Respondent Brannon was competent, but "could have been a little more motivated."

Murray recognized that Varela and Respondent Astuto may have had some personality conflicts while together on the second platoon, but could not say specifically what their interactions were. He heard about their conflicts by word of mouth from others in the command involving the incident when Respondent Astuto gave the CO the middle finger. Murray initially assumed Varela and Respondent Brannon got along fine, but subsequently heard of an interaction between Respondent Brannon and a motorist, where Respondent Brannon made a comment regarding Varela. Murray had limited knowledge of that event because he was not present when it happened.

Murray testified that he was not working on December 3, 2008, but he came in the following day and was debriefed by his supervisor, Deputy Inspector John Sprague, regarding the radio keying incident. During his meeting with Sprague, Murray observed

two radios (belonging to Respondent Astuto and Respondent Brannon) and the paperwork from the Communications Section. He learned that the officers' radios were confiscated when they used them to interrupt a radio transmission between Latorre and Varela. Apparently, Varela contacted the Communications Section and received a printout of all the radios used to transmit during the relevant time period.

When Murray looked at the printout, he saw only radio serial numbers and times of transmissions, not the Respondents' actual names. Murray then explained that, in April of 2008, the members of the command were all issued new radios. He kept a main record of all the radios he distributed with the serial number, the officer and the tax number to which each radio was assigned. Murray said the purpose of securing the two Respondents' radios was to take steps to make sure the radios were functioning properly. He took the radios to the Communications [Division Electronics] Section to ensure they were in full working order, and after they were determined to be in full working order, Murray received two receipts, saying as much (DX 1 and 2, Equipment Service Records). Murray explained that he had asked someone at the Radio Repair Unit to handwrite that he checked the radios on December 4, 2008, because the receipt did not initially state that. Once he determined the radios were in proper working condition, Murray returned to the 62 Precinct station house to begin his investigation of the incident. He spoke with Respondent Brannon during an official Department interview to ascertain whether his radio was used to key out transmissions. Respondent Brannon told him it was not, but even if it was, the act was unintentional. Murray's official Department interview with Respondent Astuto proceeded the same way. Neither officer provided a clear explanation as to what was done, or how it was done. They both said it may have happened when

they were sitting in a chair and accidentally depressed the transmit key

Murray heard the actual radio transmission that was captured after he made a request to the Communications Division for a copy of the Division 17 radio tape for the date in question, December 3, 2008 (DX 5). When he obtained the recording of the transmissions, he compared it to the list of radios used at the same time period to determine each radio that was used to key out the transmissions. Murray heard officers speaking at first, and then a number of clicks interrupting the conversation. He explained that Sprague provided him with a two-page printout from the Communications Division which showed each time a radio was keyed, identified by the radios serial number, along with the [military] time of every radio button depression (DX 3 and 4). He handwrote the corresponding officers' names next to their radios' serial numbers. Murray explained that the radio serial number VXR22986 was Respondent Astuto's and VX22981¹ was Respondent Brannon's. While both listening to the recording of the radio transmissions and reviewing the printout, Murray determined that the transmissions recorded corresponded with the usage times shown on the printout. When Murray heard Varela interrupted by rapid clicks, he thought it was intentional.

Murray explained that accidents happen with a long break, followed by Central intervening. But if someone clicks their button multiple times, it will usually be deemed intentional because there is no other explanation. Murray never heard Central intervene or any apologies about the clicking. He said that, if an officer were sitting as Respondent Astuto and Respondent Brannon stated, the button would be depressed longer than the rapid clicks he heard. "Your body just doesn't physically move that way." There were four clicks in two seconds. Murray acknowledged the radio sits in a holder affixed to the

¹ Transcribed as "DX22981" but shown on DX 2 and DX 4 as "VX22981."

Department gun belt. The holder is either canvas or leather, and the leather holders can swivel. It must be manually twisted and pulled up to be used, or else the holder locks the radio in place. Murray said the swivel mechanism cannot be locked into place, even when an officer is seated.

To talk, Murray explained, one must depress the transmit key and identify oneself to Central. Once Central acknowledges, one may then press the button again and talk. Only one person may talk at a time. When one releases the button, then he or she can hear others' transmissions. Murray said he was familiar with the radios because he was the one who issued them to the officers in the command. The radio in court was a little bigger than the officers' radios, but they worked the same way. The transmit key was a little lower on the officers' radios, but still in the same general location. The button's size and its ease of being pressed is also basically the same. Murray had the same radio as the officers. He demonstrated the rapidity with which he heard the clicks as they occurred on the day in question. Murray stated they were "pretty quick," and that "if the radio was affixed to their belt, their body would be moving in an unnatural manner." He said both officers would have had to move quite quickly to make such a sound if seated as they indicated in their Department interviews.

Murray concluded the investigation of the incident substantiating that each officer intentionally keyed out the transmissions. When Murray heard the radio transmissions, at no point did he hear either Respondent Astuto or Respondent Brannon identify himself. Neither officer was involved in the larceny job. After hearing the recording of the radio transmissions (DX 5), Murray stated that he heard Varela ask Latorre for a better description and that Latorre was keyed out when giving that description. The clicking

heard was identified as coming from Respondent Astuto's radio. Then Murray heard Varela request a time check at 9:24 p.m. He explained that time checks are used by supervisors to identify specific times in the event an investigation has to be conducted, Central will have a time locked in. The subsequent clicks were determined to originate from Respondent Brannon's radio.

During cross-examination, Murray indicated the clicks were occurring very quickly during a description of a grand larceny suspect. He said that, after the interruption was over, the description was completed after a brief delay. The delay did not cause the failure to apprehend a suspect, nor interfere with a call of an officer needing assistance. Murray agreed that the radio clicking basically resulted in a brief delay of the description being put over the air.

Murray recommended to Sprague that a CD be issued to the Respondents. At that time, Murray knew the two officers and their records. The maximum penalty for a CD would be ten days. Murray reiterated his opinion that the officers acted intentionally in keying out the radio transmissions based on the rapid succession of numerous clicks. He agreed that reason is the only one that led to his conclusion of intention. The keying that occurred was not a unique occurrence, but it was uncommon to the 62 Precinct during Murray's four-and-a-half years there.

Murray explained that he used his access to the Communications Division to get information on the two radios applicable to this proceeding. As part of his investigation, Murray did not check how often keying out occurred with any other radios in the 62 Precinct within the prior 30 days of this incident, nor 60 days of the incident. He said he knew keying out was uncommon because he generally listened to the radio every time he

was working. He did not hear keying out. Based upon his monitoring of the radio and the complaints of supervisors at the precinct, keying out was relatively uncommon. Prior to this incident, Varela never approached Murray regarding a complaint about Respondent Astuto or Respondent Brannon. In his capacity as the ICO, there were times when supervisors would complain to him about their subordinates. Sometimes, those complaints would lead to an investigation and other times they would lead to talks with the subordinates.

Murray acknowledged that the largest key on the radio is the transmit key on the side. He said it takes slight pressure to depress it, and it could be depressed by accidentally leaning on it with one's body. He noted that neither Respondent alleged that the transmit key was stuck as they tried to get up out of a chair. Murray clarified an earlier statement by saying an officer's body must be moving against an object other than with their hands in a rapid succession to produce the keying at issue in this case. Even though Murray had a gun belt and a radio, he never tested himself to see how his body could hit the key rapidly as he described, because he did not feel like moving his body in that manner. He did not feel it was necessary to test it out to see if it was natural or not. No one ever testified to seeing either Respondent Astuto or Respondent Brannon click their radio over and over again. Murray interviewed each officer's partner. Respondent Astuto and Respondent Brannon stated that they did not intentionally key their radios, and if it did happen, it was done accidentally.

On redirect examination, Murray stated that he had not looked at the officers' evaluations when he was contemplating their penalties and recommending to Sprague that CDs be issued. He said he had looked at their Central Personnel Indexes at that

point Before bringing the matter to the Department Advocate's Office, Murray and Sprague determined that they would request charges be preferred against the subject officers Neither Respondent Astuto nor Respondent Brannon complained to him, prior to this incident, of a malfunctioning radio As of December 3, 2008, the Respondents had been using their radios for seven-and-a-half months

On December 3, 2008, Respondent Astuto was partnered with Police Officer Ralph Postiglione, and they were on a job at a Best Buy store at the time of the incident When Murray asked Postiglione whether he witnessed the keying, Postiglione said he didn't really hear it and he didn't see Officer Respondent Astuto conduct it " Postiglione said he was outside and Respondent Astuto was inside when it happened Respondent Brannon's partner was Police Officer Nicholas Morin Morin told Murray that he did not recall witnessing Respondent Brannon touch his radio Murray believed they were together handling a family dispute at the time of the keying incident

Upon questioning by the Court, Murray clarified that accidental keying generally occurs when someone leans on the key for an extended period of time Then, the dispatcher will send out a loud alarm and say, ' open mic[rophone], check the carriers,' at which time everyone will check their radios to rectify the problem Murray has never heard accidental clicking as rapid as he heard in court He further stated that the clicking heard in court cannot be made unintentionally

Respondents Case

Respondents testified in their own behalf

Respondent Astuto

Respondent Astuto has worked for the Department for ten years. Upon graduating from the Police Academy, he was assigned to the 62 Precinct. He worked there for eight years. In April of 2009, he was transferred to his current command, the 67 Precinct. Respondent Astuto estimated that he made 80 to 90 arrests in his career. His assignment on December 3, 2008, was as a patrol officer in the 62 Precinct working 4 00 p m to 12 00 a m. He did not have a regular partner, but on that particular day he was working with Postiglione.

Respondent Astuto and his partner were assigned to a radio run of shoplifting at Best Buy on 8923 Bay Parkway. The partners went to the security office, where three juveniles who allegedly tried to steal a game were being detained by store security. Respondent Astuto was in uniform with his radio on the left side of his belt where he usually keeps it. He called Sergeant Salmon, who instructed him to do Juvenile Reports and to try to contact the perpetrators' family members. Respondent Astuto prepared the reports while sitting in the security office, in a chair that had "arms and stuff on it [He] could swivel around." Respondent Astuto was in the office for almost an hour, and testified that he did not hear Varela come over the air with a description for a grand larceny. He was not assigned the grand larceny job.

Respondent Astuto said that he did not intentionally depress the radio key on that particular day, and that he did not depress the key in rapid succession as has been testified to in court. He knows how to operate the radio, and said he had never depressed the key for any other reason than speaking into the radio because "there's no need to. Respondent Astuto stated that if he pressed the key without speaking, everyone would

hear "air" and background noise. He said he never tried to interrupt any transmissions he heard that day, nor would he ever do such a thing.

As an explanation for why he may have keyed the radio, Respondent Astuto offered that he is "not the smallest guy in the world" and does not fit in chairs very well. The radio was sitting underneath the arm of the chair. Respondent Astuto suggested that maybe he moved around too much or tried to get up, but he could not recall. No one ever called him on the radio to ask his whereabouts, and at the time, he said he was unaware that his radio was being keyed. He never worked with Varela. Varela has never disciplined nor issued a CD to Respondent Astuto in the past. Varela never told him he was placing him in the Minor Violations Log nor confronted him about his work ethic or professionalism. There has also never been a time when Respondent Astuto accidentally depressed the transmission key on his radio, realized it and corrected it.

On cross-examination, Respondent Astuto stated that he is currently assigned to the 67 Precinct, after being transferred from the 62 Precinct because of the December 3, 2008 incident. On that date, Respondent Astuto said he got called to respond to a shoplifting incident at the Best Buy security office on the right side of the store. He and his partner were both in full uniform. He said the radio shown in court was slightly smaller than the one he was wearing on the left side of his gun belt that day. Respondent Astuto also noted the button on his radio was slightly larger and more concave.

Respondent Astuto explained that he had a Department-issued leather radio holder that would have kept three to four inches of the radio exposed, from the battery up. The transmit key would have also been exposed. The holder had a swivel mechanism allowing it to spin freely.

Respondent Astuto's partner stood outside the office and the security office door was open such that Respondent Astuto could see his partner. During his official Department interview, Respondent Astuto recalled telling then-Lieutenant Murray that, at one point, he was waiting for the parents of the juveniles to arrive. He did not remember how long he waited, but during the entire time he could see his partner outside. Respondent Astuto agreed that it was fair to say that his partner was not with him at all times during the shoplifting job, particularly when he left the building to smoke a cigarette.

Respondent Astuto testified that he sat down to do the paperwork on the job as he was waiting for the parents because the juveniles were giving him a hard time providing him with their phone numbers and addresses. The chair he sat in was an office chair with arms. His radio went under one arm and his gun under the other. Respondent Astuto's body was flush with each arm, so much so that he could not get out of the chair. He explained that he needed to wiggle side-to-side to free himself. Respondent Astuto said he did not quickly get out of the chair. At no point did he become aware his radio microphone was open.

Respondent Astuto's radio was on during his assignment at Best Buy, but it was at a very low volume so he could barely hear it. He said he never heard communications between Latorre and Varela. Respondent Astuto's only explanation for his being the radio that transmitted five consecutive times in four seconds was that it may have happened as he wiggled up out of his chair. Respondent Astuto never worked with Varela on a particular job, but has shown up to the same job as Varela since the two were covering the same patrol. Respondent Astuto testified that Varela never spoke to him.

about how he should be treating civilians. He also cannot recall the incident Varela mentioned regarding a motorcyclist. He does, however, recall the incident involving a baby and an arrest Varela felt should have occurred. Respondent Astuto said he did take the arrest in the end.

Respondent Astuto insisted he had no problems with Varela. Regarding the incident Varela testified to about confronting Respondent Astuto for slamming a door, Respondent Astuto stated he never slammed the door. There were six people in the break room and Respondent Astuto did not know why Varela singled him out.

Respondent Astuto recalled being spoken to regarding an incident where he supposedly stuck up his middle finger at his CO. The CO told him Varela had provided the information, but Respondent Astuto said he had no feelings on the matter. It did not bother him that Varela singled him out as someone who would do such a thing to his supervisor. Respondent Astuto told the CO he did not do it, and the matter resolved itself. Subsequent to that incident, Respondent Astuto and Varela had to deal with each other at infrequent times because of their conflicting schedules. Respondent Astuto said he harbored no ill feelings toward Varela for what he saw as fabricating a story about him giving the middle finger to his CO.

Respondent Astuto testified that he would never key out anyone on the radio because it is dangerous in that people who are in serious need of help on specific time frames will not be able to communicate if the transmission is interrupted. He said he heard the rapid succession of the key being pressed on the audio recording of the radio transmission in court. He knew that rapid succession meant no other members of service could transmit or hear anything. Respondent Astuto said that if someone presses his key

and it remains pressed, everyone will just hear dead air or possibly background conversations

Respondent Astuto then went on to describe the differences in his radio from the one presented at trial. The speakers are on the opposite side of the button on his radio and the transmit button points up, as when he was wiggling in the chair. Respondent Astuto did not know whether the transmit button became stuck. He used a normal speed wiggle to get himself out of the chair. He surmised that the keying may have occurred when he tried to wiggle out of the chair.

Respondent Brannon

Respondent Brannon has been a member of the Department for approximately six years. Once he graduated from the Police Academy, Respondent Brannon was assigned to the 62 Precinct for approximately four-and-a-half years. He has made over 60 arrests in his career. He currently works in the 69 Precinct doing midnight patrol.

Respondent Brannon was working in the 62 Precinct on December, 3, 2008, when he received a message from Central that there was a family dispute. He responded to the location, as he had done before a few weeks prior. There, he observed a car pulling off. After a brief chase, Respondent Brannon decided to return to the address, not knowing if the person had a car. Once he got out of his vehicle, he and his partner, Morin, went to the complainant's door. When she did not answer at first, they began knocking on the windows. Upon hearing the knocks, the complainant answered the door and explained what happened. Then the officers went inside to check to make sure the perpetrator was not still on the premises. Apparently, an ex-boyfriend had hit the complainant and stole a

screen door

Respondent Brannon was in uniform on that day with his radio on the left side of his gun belt. He was at the location of the complaint for a while, but did not recall exactly how long. Respondent Brannon was filling out a Domestic Incident Report and a Complaint Report. He remembered that he was sitting on a bar stool while filling out the paperwork. His partner sat on the couch with the complainant, talking to her and also filling out paperwork. Then, Respondent Brannon heard something over the radio but did not know what was going on. Central did not ask his assistance with that case, so he stayed at his present location.

Respondent Brannon said that, while he was at the complainant's house, he did not repeatedly hit the transmit key on his radio. He also said he did not do it at any time during any particular day, or ever, just to hit it. Respondent Brannon acknowledged that hitting the key could be dangerous to other officers trying to communicate. He testified that he never intentionally hit the key for the purpose of disrupting anyone's transmissions in his career. At six foot, one inch and approximately 305 pounds at the time of the incident, Respondent Brannon said he may have accidentally keyed the radio while getting up or adjusting in the bar stool because it was uncomfortable. Most chairs would be a tight fit for him, especially when wearing his gun belt. He did not recall whether the bar stool had arms. There had also been times when Respondent Brannon mistakenly keyed his radio while driving in the patrol car with the radio by his side. Usually, Central would announce an open microphone.

Respondent Brannon remembered the incident Varela testified to regarding Varela's friend differently than how Varela described it. He stated that he responded to a

car accident between a sanitation truck and another vehicle. Varela's friend asked Respondent Brannon if he knew a Lieutenant Varela. Respondent Brannon responded that there was a Sergeant Varela at his precinct and then continued his work. To Respondent Brannon's knowledge, no formal complaint was ever filed against him with regard to that incident, nor was he interviewed by CCRB. When Varela called Respondent Brannon at home after the incident, Respondent Brannon said Varela became irate. Respondent Brannon told him he did not feel comfortable with him, and that they could discuss it the next time they were both at work.

The next day, when Varela asked to speak to Respondent Brannon in his office, Respondent Brannon refused, saying he did not feel comfortable being alone in a room with him after the phone call the night before. Respondent Brannon then met with his delegate. He was not issued a CD after the meeting.

On cross-examination, Respondent Brannon testified that he is currently at the 69 Precinct as a result of what transpired in the 62 Precinct. He said he responded to a domestic family dispute call at approximately 9 05 p.m. on December 3, 2008. He had been there before for a domestic incident. After some time, the complainant answered the door, at which time Respondent Brannon noticed she was the only one in the residence. His partner was talking to the complainant and filling out paperwork while Respondent Brannon sat down on a bar stool. The living room had a couch and there was a bar area adjacent to the living room with a bar stool. On the particular date Respondent Brannon was the operator and his partner was the recorder. Respondent Brannon said he chose not to sit on the couch because the table in front of it was broken. The bar stool had the bar next to it for him to write on. He could not recall if the stool

had arms, but he did remember that it was uncomfortable. He did not recall if his arms were obstructed in the chair. He was writing with his right hand on top of the bar. He did not remember where his left hand was. He was in uniform that day wearing his gun belt. His radio was normally on his left side. Respondent Brannon had no difficulty maneuvering the pen to write on the papers. He testified that he did not recall his radio on his left side being obstructed.

Respondent Brannon said he was unsure how many times before this incident he inadvertently keyed his radio. He mentioned that he could have been sitting or leaning on a wall, depending on where the radio was placed. Central had come over the air announcing an "open mic" before when his key was depressed. He said Central will alert the members of service if the depression is steady. He did not hear such an alert on December 3, 2008.

Respondent Brannon verified that he leaves his radio on when he goes to jobs to monitor what is happening. He did so on December 3, 2008. He believed he could still hear the radio while at the complainant's house, even though he had turned the volume down so as to hear her. He was three or four feet from his partner while writing on the bar stool. Respondent Brannon testified that, at some point, his partner was looking at his report and at other times, speaking with the complainant. He was interviewed by the Department regarding this incident, where he was informed that four keys emitted from his radio in two seconds. Respondent Brannon had no explanation for how he could have mistakenly depressed four times in two seconds. He had heard before, in his six years with the Department, such rapid keying like the keying he heard in court. What he heard afterwards depended on the situation. He had heard Central broadcast an "open mic"

after he heard open air or background conversation. In the transmission he heard at trial, Respondent Brannon heard someone talking prior to but not during the keying. He acknowledged that someone would be interrupted if another was keying him out, but denied intentionally keying anyone out.

Regarding the incident with Varela's friend, Respondent Brannon insisted he said nothing negative but merely stated that there was a Sergeant Varela at his command, not a Lieutenant Varela. His partner was also at the scene, and may have been Police Officer Ajello. Respondent Brannon did not recall whether his partner also had any interaction with Varela's friend. He was also unsure whether his partner was called or brought in by Varela to discuss misconduct in communicating with the public. Respondent Brannon said it did not bother him that Varela singled him out. He testified that, when working as Varela's driver, his activity did not increase. They worked together for a short while when Varela first came to the command. Respondent Brannon said Varela treated him fairly.

Respondent Brannon testified that he probably slid out of the bar stool to the side to get up. He denied that his ability to slide out sideways meant there were no arms on the chair.

FINDINGS AND ANALYSIS

Respondents Brannon and Astuto each stand similarly charged herein with wrongfully engaging in conduct prejudicial to the good order, efficiency or discipline of the Department in that said police officer purposely depressed the transmit key of his Department radio numerous times in succession during ongoing radio transmissions.

between a radio dispatcher and a sergeant attempting to obtain a description of a suspect wanted in connection to a crime, thereby interrupting the radio transmission communication Both Respondent Brannon and Respondent Astuto are found Guilty as charged

Evidence adduced at trial established that during the course of a radio transmission by Police Officer Latorre regarding a description of a suspect of an alleged larceny (purse snatching), several clicks were heard over the radio in rapid succession interrupting his transmission When then-Sergeant, now Lieutenant, Varela attempted to make a transmission over the air to get further information on the job, several clicks were again heard over the radio interrupting his transmission also Varela testified that immediately following his attempted transmission, he asked for a time check from Central He explained that this is a tool used by a supervisor when an unnecessary radio transmission is made to note the time so that if one had to review the transmission at a later point, a time certain will be noted. Based on this time check, Captain Murray, who was then a lieutenant and ICO of the command, was able to request the radio transmissions for the 62 Precinct for the incident date, December 3, 2008 He was also able to review the compact disc from the moment of the time check back to the points of the clicks He was then able to obtain a written summary of the transmissions which can ascertain by the seconds which radio (by serial number) made the transmissions

Murray testified that he had issued new radios to members in his command He maintained a master list of the radio serial numbers and the members of service assigned to each radio When he compared the written summary of the transmissions to his master list of radio assignments, he was able to conclude following his investigation that the first

rapid-succession clicking which interrupted Latorre's description of the suspect came from Respondent Astuto's radio. The second set of rapid-succession clicking which interrupted Varela's request for a time check from Central came from Respondent Brannon's radio. Murray made it clear that if an immediate investigation had not been done, there would have been no way to ascertain who made these transmissions, but the request from Central of the radio transmissions was made the following day.

The ICO, Murray, who has been a member of the service for approximately 13 years, testified that there is no way that an accidental transmission could perform the rapid successions in three seconds that came from Respondent Astuto's radio. He explained that the body would have to hit a surface to cause four clicks in two seconds (Respondent Brannon's radio) which he explained is an "unnatural" movement of the body. In addition to the ICO, Varela, as well as Latorre, also testified that accidental radio transmissions come over the radio as long pauses of air. Central follows this by a sound and a transmission of an "open carrier" or "open mic" to indicate that someone is holding down the transmit button. All three members of the service testified credibly that members of the service check their radios to see if they are accidentally holding down the radio. None of these members of the service stated that rapid-succession clicks are ever transmitted accidentally over the radio. In fact, rapid-succession clicks are known as "keying out" and are deliberate acts because any ordinary transmittal requires holding the button to transmit the message and releasing the button to hear any response.

Respondent Astuto testified that, at the time of the rapid transmissions attributed to his radio, he was assigned to a shoplifting job at Best Buy on Bay Parkway. He was seated in the security office preparing Juvenile Reports. He explained that he was seated

in a chair with arms and he was in uniform wearing his gun belt with his radio on the left side of his belt where he always wears it. He testified that at no point did he try to key out any transmissions. He stated that he did not even hear the larceny transmission and he was never assigned to that job. He said that the only thing he could suggest was that he moved around too much trying to wiggle to get out of the chair as a big guy, but he had no recollection of that happening.

Respondent Brannon testified that at the time of the incident, he was with his partner at the scene of a family dispute in a home. His partner was sitting with the complainant doing paperwork on the couch, and he was seated on a bar stool leaning on the bar, also completing paperwork. He could not recall if the bar stool had arms, but he recalled that at six foot, one inch and weighing 305 pounds, sitting on the bar stool was uncomfortable. He recounted that he did not sit on the couch because the glass table in front of it was broken from the domestic incident. He recalled sliding off of the stool to get up. He stated that if he keyed his radio, it was not intentional, but an accident while he got off of the bar stool.

While both Respondents suggested that in the process of maneuvering out of a chair, they may have caused the keying, no other witness before this tribunal agreed that a transmission of four clicks in two seconds could be an accident, or even result from body movement. Varela, Murray and Latorre all demonstrated that four clicks in two seconds could only occur with rapid finger movements on the transmit button on the radio and such action is intentional.

Based on the investigation into this matter as testified to by Murray, and the corroborating testimony of Varela and Latorre, I found the Department has proved its

case by a preponderance of the credible evidence

Accordingly, I find Respondent Brannon and Respondent Astuto Guilty as charged

PENALTY

In order to determine an appropriate penalty, Respondents' service records were examined, see *Matter of Pell v Board of Education*, 34 N Y 2d 222 (1974)

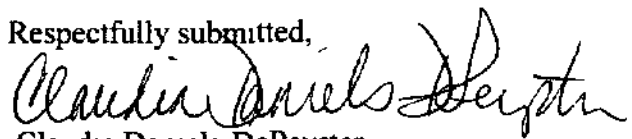
Respondent Brannon was appointed to the Department on January 10, 2005
Respondent Astuto was appointed to the Department on September 29, 2000
Information from their personnel folders that were considered in making this penalty recommendation are contained in the attached confidential memoranda Respondents Brannon and Astuto have each been found Guilty of purposely depressing the transmit key of his Department radio numerous times in succession during an ongoing radio transmission interrupting the communication Latorre and Varela each testified that as they attempted to get further information from Central on a larceny, they were keyed out An immediate investigation ensued, including a time check for the transmissions It was later ascertained that both Respondents were responsible for the interruption in the radio communication Neither Respondent had an explanation for the rapid-succession clicks heard during the radio transmissions other than each stated he may have hit his radio getting out of a chair

The Assistant Department Advocate asked for a penalty of the forfeiture of 30 vacation days and one year dismissal probation for each Respondent It is very serious misconduct to key out transmissions, particularly those of a criminal nature Central was

broadcasting information on a purse snatching Latorre wanted more information on the suspect so that he could conduct a canvass for the suspect Varela, the patrol supervisor, wanted more details also Time is of the essence and because of the keying out of both transmissions, a delay nevertheless ensued The impact on the safety of other officers that this type of misconduct can have is immeasurable Respondent's argued that they were initially offered Command Disciplines with respect to this matter However, given the serious nature of these offenses, coupled with each of their service records, a period of Department monitoring is warranted.

Accordingly, I recommend that Respondent Brannon and Respondent Astuto be DISMISSED from the New York City Police Department, but that their dismissals be held in abeyance for a period of one year, pursuant to Section 14-115 (d) of the Administrative Code of the City of New York, during which time they are to remain on the force at the Police Commissioner's discretion and may be terminated at any time without further proceedings The Court further recommends that Respondent Brannon and Respondent Astuto each forfeit 30 vacation days

Respectfully submitted,



Claudia Daniels-DePeyster

Assistant Deputy Commissioner – Trials

APPROVED

OCT 17 2011



RAYMOND W. KELLY
POLICE COMMISSIONER


POLICE DEPARTMENT
CITY OF NEW YORK

From Assistant Deputy Commissioner – Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
POLICE OFFICER JAMES ASTUTO
TAX REGISTRY NO 926611
DISCIPLINARY CASE NO 85943/09

In 2008, Respondent Astuto received an overall rating of 3.0 "Competent," in 2009 he received an overall rating of 2.0 "Low," and in 2010 he received an overall rating of 3.5 "Above Competent" on his annual performance evaluations. On December 15, 2009, Respondent Astuto received a Negative Evaluation which was very low in (2) performance areas related to apprehension/intervention and (2) behavioral dimensions, and low in (1) performance areas related to community interaction and behavioral dimensions. Respondent Astuto Brannon has received two Excellent Police Duty Medals in his career.

[REDACTED]
[REDACTED] On March 12, 2009, Respondent Astuto was placed in Level II Performance Monitoring based on his overall record. He completed performance monitoring effective September 20, 2010. However, effective September 20, 2010, Respondent Astuto was placed in Level III Special Monitoring based on poor performance. On April 7, 2009, Respondent was transferred for cause from the 62 Precinct to the 67 Precinct for unauthorized radio transmissions in connection with this case.

For your consideration


Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials


POLICE DEPARTMENT
CITY OF NEW YORK

From Assistant Deputy Commissioner – Trials
To Police Commissioner
Subject CONFIDENTIAL MEMORANDUM
POLICE OFFICER AHMAD BRANNON
TAX REGISTRY NO 936238
DISCIPLINARY CASE NO 85942/09

In 2008, 2009 and 2010, Respondent Brannon received an overall rating of 3.0 "Competent" on his last three annual performance evaluations. On December 3, 2008, Respondent received a Negative Evaluation which was low in performance areas and behavioral dimensions. Respondent Brannon has received one Excellent Police Duty Medal in his career.

[REDACTED]
[REDACTED] On March 11, 2009, Respondent Brannon was placed in Level II Performance Monitoring based on his overall record. On April 7, 2009, Respondent Brannon was transferred for cause from the 62 Precinct to the 69 Precinct based on the unauthorized radio transmission allegation in this case, poor performance and numerous Command Disciplines.

For your consideration


Claudia Daniels-DePeyster
Assistant Deputy Commissioner – Trials